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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: NOV 18 2005
WAC 02 087 55879

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) remanded the matter on appeal for a complete copy of the record of proceeding (ROP). The ROP has now been returned to this office for adjudication of the appeal on its merits. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a structural engineer. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel asserts that the director failed to take into account all of the evidence submitted. The petitioner submits no new documentation. The complete ROP confirms our previous assumption that the petitioner submitted a single packet of documents in support of two petitions in separate classifications. As stated in our previous decision, there are no provisions permitting the submission of one set of documents in support of two separate petitions. Rather, every petition must be filed with the evidence required and that evidence is considered part of the petition with which it was filed. 8 C.F.R. § 103.2(b)(1). Nevertheless, as also stated in our previous decision, the director did not request another set of evidence. Now that the petitioner's entire alien file is before us, we are able to evaluate the evidence that was submitted in support of this petition and a separate petition in a different classification. In adjudicating the appeal, we will evaluate the evidence that clearly relates to the classification sought by this petition.

Finally, we note that on March 10, 2004, the petitioner adjusted to conditional permanent resident status based on an underlying family-based petition. As the petitioner has not yet removed the conditions on his residence, however, we will not dismiss the petition as moot.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in Engineering from the University of California, Berkeley (UC Berkeley). The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The director's decision focuses on whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra

benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

While studying for his Ph.D. in Engineering at UC Berkeley, the petitioner researched various seismic mitigation engineering designs. Upon obtaining his degree, the petitioner began working as a structural engineer for [redacted]., an engineering consulting practice.

Counsel asserts that the petitioner's work on "earthquake resistant structures, environmentally friendly hospitals and his Las Vegas Mall project" constitute the type of "specific prior achievements" discussed in *Matter of New York State Dep't of Transp.* 22 I&N Dec. at 219 as well as the development of "a new technology or innovation" discussed in the same decision at page 221, n. 7. Counsel then compares the petitioner with other aliens counsel asserts have recently obtained the benefit sought. Decisions made by the Service Centers and nonprecedent decisions by this office are not binding on us. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001); *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). As counsel acknowledges, national interest waiver requests are adjudicated on a case-by-case basis. Moreover, without the entire records of proceedings of the cases referenced by counsel, we are unable to compare the petitioner's qualifications. Thus, counsel's comparisons of the petitioner with other aliens who have allegedly received the same benefit are not persuasive.

As with *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 220, the issue in this case is not whether proper bridge or building design is in the national interest, but rather whether this particular petitioner, to a greater extent than U.S. workers having the same minimum qualifications, plays a significant role in the preservation and construction of bridges. *Id.*

The petitioner submitted two letters from faculty at UC Berkeley and a letter from [redacted], a principal at Arup. Professors [redacted] and [redacted] praise the petitioner's intelligence and skills. Professor [redacted] specifically notes the petitioner's ability to "combine theoretical and experimental work." Professor [redacted] further asserts that the petitioner's work "resulted in important findings about the role of damping to mitigate earthquake responses of bridges and yielded practical design recommendations for the California Department of Transportation (Caltrans)." Counsel asserts that the petitioner was "only one of three full time researchers chosen by Caltrans from applicants from all over the United States to undertake this work." The record does not support this assertion and the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980).[1] Professor [redacted] asserts that he invited the petitioner "to help me prepare and solve end-of-chapter problems" for Professor [redacted] book, which he asserts has been adopted as a textbook at over 90 universities in the United States. The record contains the acknowledgement section of the book, which credits the petitioner and seven other students, "present and former," with this role. The author of the textbook itself, however, has a far more persuasive claim to have influenced the field than the student who assisted with the end-of-chapter problems.

We acknowledge that the petitioner has authored published articles and presented his work at conferences. Merely demonstrating that one has published and presented one's work, however, is not presumptive evidence

[1] The record also lacks support for other assertions made by counsel, such as the petitioner's use of "green" or environmentally sound designs.

of the influence of that work in the field. While counsel provides citations for articles that allegedly cite the petitioner, only two of them are by independent engineering teams. While self-citation is a normal and expected practice, such citations cannot demonstrate an influence in the field beyond one's own work.

In response to the director's request for additional evidence, which states that the reference letters are from the petitioner's colleagues, counsel notes the submission of a letter from [redacted] Associate Dean of Engineering at the University of Miami. Based upon a review of the petitioner's educational and work history as well as the caliber of the journals that published the petitioner's articles, [redacted] concludes:

> Based upon my professional experience, I have concluded that [the petitioner] is an excellent structural engineer (structural dynamics and earthquake engineering) whose contribution will eventually benefit greatly to [sic] the United States to a degree that would be extremely difficult to replicate with a United States engineer who possesses the same minimum qualifications and experience.

[redacted] does not identify any specific achievement that has already influenced the field, does not indicate that the petitioner has influenced his own work and does not indicate that he was aware of the petitioner's work based on the petitioner's reputation prior to being approached for an evaluation. Regardless, [redacted] merely speculates as to the petitioner's ability to "eventually" benefit the national interest.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.